82-113 NO.____

Office - Supreme Court, U.S.
FILED
JUL 30 1982
ALEXANDER L. STEVAS,
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

RALPH TUTINO,

Petitioner,

-vs.-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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Questions Presented

1. Was the contrived warrantless procuring of an electronically recorded conversation, via sophisticated electronic overhearing, through the walls and door of petitioner's hotel room, allegedly obtained via consent of a guest, *i.e.*, Richard Sanchez, a police agent, in violation of petitioner's constitutional and statutory right of privacy?

2. Was the petitioner, convicted after jury trial for Indictment 2100-79 of one count of usury in the first degree, New York Penal Law Section 190.42, a Class C Felony upgrading Penal Law Section 190.40, a Class E Felony, via "a scheme" or business of making or collecting usurious loans, for apparent interrelated transactions occurring during the period 1977 to 1979 and acquitted at trial of grand larceny by extortion, subjected to multiple jeopardy (double jeopardy) when forced to plead guilty to the charges in the nine other indictments, which based on facts involved interrelated transactions and contained identical charges, related and testified to at the first trial?

3. Did the prosecutor's uncontrolled misconduct and vindictiveness during trial violate petitioner's right of due process of law?

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

Jurisdiction

Opinions of the courts below, New York Court of Appeals dated May 21, 1982 denying leave and permission to appeal from an affirmance by the New York State Supreme Court, Appellate Division, First Department, of conviction are set forth in Appendix, *infra.*

New York State Court of Appeals certificate denying leave to appeal is dated May 21, 1982. Jurisdiction of this Court is made and conferred via 28 U.S.C. 2101(d), Rule 21 of the Supreme Court and the Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States are involved herein.

Statement of the Case

On October 5, 1979, petitioner was charged with seven indictments including usury and grand larceny by extortion in the first degree. On November 13, 15 and 20, 1979, three additional indictments were obtained including charges for usury in the first degree and conspiracy in the fourth degree.

For the Court's convenience, the following schedule sets forth the aforementioned indictments, various counts therein, dates involved and complainants included:

Ind.	*Parties*	*Counts*	*Dates*	*Complain't*
2100/79	Tutino Salzarulo	1st-Usury 1st Degree	7/79-9/79	Barron Bracken
		2nd-Grand Larceny (Extortion)	7/79-9/79	
2115/79	Tutino Ardito	1st-Crim. Usury 1st Degree	6/78-9/79	Richard Sanchez
		2nd Grand Larceny (Extortion)	6/78-9/79	Richard Sanchez
2099/79	Tutino Marrazzo	1st-Usury 1st Degree	2/77-12/78	Richard Sanchez
		2nd Grand Larceny Extortion	2/77-12/78	Richard Sanchez

		3rd-Usury 1st Degree	Spring 1979 9/79	Frank Starace
		4th Grand Larceny Extortion	3/79-9/79	Frank Starace
2098/79	Tutino Langano	1st-Usury 1st Degree	2/79-9/79	Richard Sanchez
		2nd Grand Larceny	2/79-9/79	Richard Sanchez
		3rd Usury 1st Degree	Spring-79 9/79	Frank Starace
2101/79	Tutino Mastriocovo	1st Usury 1st Degree	2/77-12/78 ~~12/78~~	Richard Sanchez
		2nd-Grand Larceny Extortion	2/77-12/78	Richard Sanchez
		3rd Usury 1st Degree	Spring '77 9/79	Frank Starace
		4th Grand Larceny Extortion	Spring '77 9/79	Frank Starace
		5th Crim. Usury	8/79-9/79	Richard Sanchez
		6th Grand Larceny Extortion	8/79-9/79	Richard Sanchez

2102/79	Tutino DeSimone	1st Usury 1st Degree	2/77-12/78	Richard Sanchez
		2nd Grand Larceny Extortion	2/77-12/78	Richard Sanchez
2115/79	Tutino "John Doe" ("Tony Rings")	1st Usury 1st Degree	Summer-12/79	Richard Sanchez
		2nd Grand Larceny Extortion	3/79-9/79	Richard Sanchez
2407/79	Tutino Salzarulo	1st Usury 1st Degree	12/78-8/79	Charles Santoro
2475/79	Tutino Ardito Evangelista	1st Conspiracy (P.L. 105.10) to Commit Usury		Richard Sanchez
2447/79	Tutino (all of the other defendants hereinabove named except Aridto)	Conspiracy	2/77-9/79	Frank Starace

No stay of execution of sentences imposed (5 to 15 years on each count to run concurrently) was granted.

Pre-Trial Hearing

Timely written application prior to trial for suppression of certain tape recordings garnered through execution of warrants was made. Moreover, these applications also dealt with the issue of warrantless electronic surveillance that the District Attorney claimed was "consensual," *i.e.*, Sanchez and Bracken wore sophisticated recording devices on their persons and that Starace, who also cooperated, allowed his voice to be recorded when he had discussions with the petitioner.

During an evidentiary hearing regarding a tape of a conversation which occurred July 17, 1979 between petitioner and Sanchez at the Rye Hilton Hotel, the prosecutor initially revealed that Sanchez though not wearing a body recorder consented to having the conversation recorded. A sophisticated recording device was wedged between the door and carpet in a room adjoining petitioner's room and was activated when Sanchez entered petitioner's room. It was claimed at that time that Detective Marsion, laying on the floor with his ear to the bottom of the closed door, using a nagra, for "the better part of an hour" was able in this position to overhear the conversation with his ear.

Evidently, due to the nature of this basic intrusion into the right of privacy, it was admitted that no other conversations were obtained between petitioner or anyone else by this method. The Court ruled that Sanchez consented to this conversation and that it had no effect that the police occupying the adjoining room were using sophisticated electronic surveillance without warrant and piercing the walls of the room. Further, that the detective while lying on the floor with his ear to the bottom of the closed door could overhear the conversation and that "the eavesdropping was accomplished without resorting to any unauthorized physical penetration into the premises occupied by the petitioner . . .".

It was adduced at trial that Marsension knew of the meeting between Sanchez and Petitioner well in advance of the hearing, that this was not "court authorized surveillance" and that the police occupied the adjoining room at least two days prior to this conversation.

No notes of this conversation were made and that this conversation's record was listened to a few days subsequent and that prior to trial the authorities heard this conversation at least twice.

The content of this conversation was devastating and the recording thereof was used more than once by the prosecutor during trial and at summation.

Trial

Trial was commenced solely on indictment 2100/79 although prior to trial petitioner, pursuant to Sections 200.20 CPL and 40.03 CPL, timely moved for a consolidation of all the indictments and all of the counts in each and every indictment so that pursuant to the Fifth Amendment to the Constitution, et al. the petitioner would have had to face one trial.

The indictment principally arose from the testimony of Barry Bracken and Richard Sanchez, both associated for a time in the nursing home business and charged with defrauding $50,000.00 from the State of New York. It was arranged for Bracken to borrow $5,000.00 from petitioner and that Bracken would pay $100.00 a week solely as interest on the $5,000.00 loan and principal ($5,000.00) would still be owed. The $5,000.00 loan to Bracken was made in installments, $1,000.00 on July 27th and $4,000.00 to Sanchez on July 30, 1979. The latter received the money due to the fact that Bracken went on vacation.

The rest of the testimony related to late payment of interest by Bracken and the interrelated other facts pertaining to the other indictments. Sanchez, Starace, Bracken and the police officers involved testified as to the circumstances surrounding this loan plus all other loans to Sanchez and Starace included in the other indictments.

Reasons for Granting the Writ

POINT I

THE CONTRIVED WARRANTLESS PROCURING OF AN ELECTRONICALLY RECORDED CONVERSATION VIA SOPHISTICATED ELECTRONIC OVERHEARING THROUGH THE WALLS AND DOOR OF PETITIONER'S HOTEL ROOM, ALLEGEDLY OBTAINED VIA CONSENT OF A GUEST, I.E., RICHARD SANCHEZ, A POLICE AGENT, VIOLATED PETITIONER'S CONSTITUTIONAL AND STATUTORY RIGHTS OF PRIVACY.

The Fourth, Ninth and Fourteenth Amendments to the Federal Constitution governing the right of privacy and Article 1, Section 12 of the New York State Constitution, State counterpart to the Fourth Amendment to the Federal Constitution, protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's room — a zone that finds its roots in clear and specific constitutional terms. "The right of the people to be secure in their . . . houses . . . shall not be violated."

Congress quite properly has undertaken to protect the public against all forms of sophisticated electronic overhearings within the limits of its authority. Where the overhearing involves an oral communication, then cognizant of its limited authority, Congress has made the overhearing with a mechanical device a criminal offense only so long as the communication is shown beyond a reasonable doubt to be wilful and also to be a communication meeting the special requirements of privacy found in the definition

of "oral communications." The oral communications involved in this case are all as defined in U.S.C. Section 2510(2).

Privacy

As a general rule absent consent a warrant is constitutionally required. *Katz v. U.S.*, 389 U.S. 347 (1967), focused on the question of a party's reasonable expectation of privacy. The two-pronged test involved — first, whether the individual has exhibited an actual expectation of privacy and second, whether the individual's subjective expectation of privacy is one that society is prepared to recognize. All doors to Tutino's hotel room were locked and there is no evidence that, absent lying on the floor with an ear to the bottom of the closed door, *i.e.*, placing of an ear by trespass or otherwise in an unusual or improper position, the conversation could have been overheard. A person should not be required to take unreasonable precautions to prevent others from doing that which they ought not to do in the first place. *Cf. E. I. duPont de* Nemours & Company v. Christopher, 431 F.2d 112 (5th Cir. 1970). The protection of the Fourth Amendment is invoked when the individual claiming it has a legitimate expectation of privacy in the invaded place. *Rakas v. Illinois,* 439 U.S. 128, 143 (1978).

Although not specifically enumerated in the Constitution, the right of privacy long has been recognized. Property interests once were considered paramount in Fourth Amendment applications. *See, e.g., Goldman v. U.S.*, 316 U.S. 129 (1942), *Olmstead v. U.S.*, 277 U.S. 438 (1928). But as the Supreme Court observed in *Rakas v. Illinois,* 439 U.S. 128 (1978), its decision in *Katz v. U.S.*, 389 U.S. 347 (1967), repudiated *Olmstead and Goldman* and "held that capacity to claim the protection of the Fourth

Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection has a legitimate expectation of privacy in the invaded place." 439 U.S. at 143. However, consideration of property interests are not irrelevant to the legitimate expectation of privacy analysis. The decisional standards developed in *Rakas* traces Justice Harlan's suggestion in his concurrence in *Katz*; specifically, the individual asserting the privacy interest must demonstrate an actual (subjective) expectation of privacy and the expectation must be in accordance with social notions of reasonableness.

Initially a "right of entry" cannot be viewed as synonomous with a "right to search" or consent to recording via sophisticated electronic overhearing. The police officer did not use a normal commercial cassette type recorder with a standard microphone. It would be paradoxical to find an implied right based on entry to consent to use of contrived sophisticated electronic overhearing from the next room.

Privacy interests that the Fourth Amendment protects are stronger in residential premises than in business premises and the Courts have strictly applied warrant standards in dealing with residences or other dwellings. Petitioner's reasonable expectation of privacy in the closed interior space of his hotel room was invaded by use of sophisticated electronic devices comparable to magnetometers or microphones attached to outside walls, devices which involve the full rigors of the Fourth Amendment rubric.

In a concurring opinion in *Katz v. U.S.*, 389 U.S. 347 (1967), Justice Harlan states that the prior holding of the Court in *Goldman v. U.S.*, 316 U.S. 129 (1942) "that electronic surveillance accomplished without the physical

penetration of petitioner's premises by a tangible object did not violate the Fourth Amendment must be overruled because 'it's limitation on Fourth Amendment protection is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion.' "

He also stated, " * * * (a) That an enclosed telephone is an area where like a home, *Weeks v. U.S.*, 232 U.S. 383 . . . , a person has a constitutionally protected reasonable expectation of privacy" at page 360.

It is commonly accepted that a "search' ' is a government intrusion upon or invasion of, a citizen's personal security in an area in which he has a reasonable expectation of privacy. In the absence of either exigent circumstances or consent by the owner, a warrant must first be obtained.

The door involved where the sophisticated electronic device was placed was not open to the public, but only a door between rooms. This door was located in an inaccessible private vantage point, which officers obtained in a private room for eavesdropping. Police officers cannot employ a pretext to escape Fourth Amendment prohibition and cannot rely on an exigency that could have easily been avoided. The rule seems to be that evidence discovered in plain view from a place where officers are entitled to stand and where their claim is not created as a pretext, solely to make legitimate otherwise impermissible intrusions is not the subject of a search within the meaning of the Fourth Amendment, and seizing such evidence does not trigger a warrant requirement. *U.S. v. Kaiser* (5th Cir. 1977), 545 F.2d 467, 477. The validity of the officer's renting the room next to Tutino, obviously as a pretext, solely

to make otherwise impermissible intrusions is only one of the fulcrums on which this case should turn.

The legal principles that protect privacy do not protect the desert islands, the mountain top or the open field — even one the owner has posted with a "no trespass" sign. The human relations that create the need for privacy do not ordinarily take place in these settings. *See, U.S. v. Oliver* (6th Cir., May 5, 1982), 50 L.W. 1186. However, it does protect the hotel room and history has shown an unawareness of any means, other than a warrant requirement, by which the right to be free from unreasonable searches can be effectively protected.

The Fourth Amendment established an environment in which individual emotional and mental processes can develop freely without surveillance or interference. The human relations that create the need for privacy ordinarily do take place in settings such as hotel rooms.

Overhearing With Naked Ear

It must be stipulated that this was a wilful interception. A sophisticated electronic device was used to pick up the conversation. This was not the case where a conversation was overheard from an adjoining hotel room by the unassisted ear and recorded via a commercial cassette-type recorder. There is no question that this overhearing was contrived via eavesdropping from a position where an individual would not normally be expected to be. His ear was placed by trespass or otherwise in an unusual and improper position. The police officer knew that the circumstances of the conversation justified an expectation of privacy on the part of the speaker. The device itself was placed in an unauthorized place in order to pick up what could not be heard by an uncontriving hearer.

Moreover, the police officer, without a warrant, had no right to contrivedly be in the hotel room next to the petitioner. His presence there was solely to create a pretext in order to attempt to legitimatize an otherwise impermissible intrusion so as not to trigger a warrant requirement.

A citizen is not obliged to "construct an opaque bubble over his property" to maintain an expectation of privacy. *U.S. v. Allen* (9th Cir. 1980), 633 F.2d 1282, 1289. He need only take those "precautions customarily taken by those seeking privacy (*Rakas v. Illinois, supra*). (Conc. opn. of Powell, J.). Thus a person who surrounds his backyard with a solid fence exhibits a reasonable expectation of privacy for that area * * * That reasonable expectation is not extinguished because the peeping Tom or eavesdropper is not a trespasser." As Justice Grodin perceptively noted in his concurring opinion in *People v. Superior Court* (Spielman) (1980), 102 Cal. App. 3rd 342, 348, footnote 2 (162 Cal. Rptr. 295), "when the Court in *Lorenzana v. Superior Court* (1973), 9 Cal. 3rd 626 (108 Cal. Rptr. 585, 511 P. 2d 33) spoke of 'salutory rule of law that observations of things in plain sight made from a place where a police officer has a right to be do not amount to a search in the constitutional sense.' (9 Cal. 3rd at page 634)," the kind of place the Court was referring to was a public vantage point. The next sentence in the opinion reads "On the other hand when observations are made from a position to which the officer has not been expressly or impliedly invited, the intrusion is unlawful unless executed pursuant to a warrant or one of the established exceptions to the warrant requirements."

The policeman here cannot fairly be said to have been expressly or impliedly invited by petitioner to lie on the floor in the next room so he could overhear the conversation, nor was he enticed to peek under the door. A public

vantage point means "a place accessible to those member of the public not preternaturally inquisitive." (See note, Aerial Surveillance (1981 50 Fordham L. Rev. 273, 284 quoting from *U.S. v. Taborda* (2nd Cir. 1980), 635 F.2d 131, 135-136. The conversation involved was not one able to be orally overheard by a naturally curious passerby. The doctrinal basis for the plain view rule is that "what a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection" *Katz v. U.S.*, 1967, 389 U.S. at 351. A thing is not in plain view if the police must take some unusually inquisitive steps to obtain it. Since a naturally curious person is not a peeping Tom or an eavesdropper, the non-public doorway was not a public vantage point within the meaning of the plain view doctrine.

Although the Second Circuit in *U.S. v. Agapito*, 620 F.2d 324 (1980) approved government agent's eavesdropping on defendant's conversations by pressing their ears to the connecting doors of the defendant's hotel room, no sophisticated electronic devices were used and this opinion is in direct conflict with the First Circuit, *U.S. v. Guilbe Irizarry*, 31 Cr. L. 2073, 3/19/82, which holds that a person obtains privacy by renting a hotel room and only the person who rented the room has a right to enter it.

The superficially appealing analogy between the detective overhearing the conversation in the next room lying on the floor and for instance normal overhearing in a hotel room is upon reflection inapt. Prosecutors' arguments misapprehend the importance of a person's privacy interest.

Consent

The threshhold question is under what circumstances,

if any, may a guest, without court authorization, via consent, authorize intrusion by piercing a room or private residence via sophisticated electronic devices, or the line separating mere consent to overhear a conversation by use of a recorder on the person indicative of being able to overhear a personal conversation (*U.S. v. White*, 401 U.S. 745 and *Lopez v. U.S.*, 373 U.S. 427 (1963)) and impermissible use of sophisticated electronic devices.

The cardinal principle of the Fourth Amendment is that a warrant is required unless some grave emergency can be shown that necessitates immediate action. Warrantless eavesdropping, never before condoned by any Court, should be strictly circumscribed by the exigencies which justify its initiation.

Courts must rely on facts and specific consent so that they are not susceptible to manipulation by law enforcement officials. This is not a case which fits into any of the exceptions to the rigid rule that warrantless searches are per se unreasonable.

Sanchez legitimately entered the room. Once inside, he had no right to consent to police eavesdropping via pervasive electronic equipment piercing the walls and door of petitioner's hotel room without prior approval of a detached Magistrate. This warrantless eavesdropping was not justified by exigent circumstances and, therefore, is contrary to the Fourth Amendment. This was an unjustified penetration of a constitutionally protected area — an area that is not accessible to any "curious passerby." Such wide ranging electronic surveillance, not countenanced by the protective reflection of a neutral Magistrate and not necessary or contemplated by Sanchez

to respond to an emergency, are precisely the invasions of privacy that the Fourth Amendment prohibits. By relating that the officer contrivedly lying on the floor with his ear to the door with a sophisticated recording device wedged between the door and carpet in an adjoining room piercing the closed door and walls, had the consent of Sanchez to perform this act, cannot avoid the fact that the officer himself on the floor was trespassing on petitioner's privacy. The police officer had no right or authority to pierce the doors and walls of petitioner's room.

The essential purpose of the proscription of the Fourth Amendment is to impose a standard of reasonableness upon the exercise of discretion by government officials in order to safeguard the privacy and security of individuals against arbitrary invasions. *Delbruce v. Prouse,* 440 U.S. 648 (1979).

The Court's opinions consistently have emphasized that in light of the Constitutional protection traditionally accorded to the privacy of the home, police officers should resolve any doubts regarding the validity of breaching the vitality of privacy of the home in favor of obtaining a warrant, *i.e., Johnson v. U.S.,* 333 U.S. 10, 14 (1948).

Any assumption that evidence sufficient to support a Magistrate's disinterested determination to issue a search warrant will justify the officer in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.

It would appear that the permissible line of demarcation has been crossed over and a warrant was required herein.

The Michigan Supreme Court in *People v. Beaners*, 227 N.W.2d 511, 393 Mich. 554 (1975) interpreting Article 1, Section 11 of the Michigan Constitution of 1963, language of which is very similar to the Fourth Amendment, held that electronic surveillance may not be conducted without a warrant even if one of the parties to the communication consents to the invasion of privacy. The Court recognized the "significant distinction between assuming the risk that communications directed to one party may subsequently be repeated to others and the simultaneous monitoring of a conversation by the uninvited ear of a third party functioning with one of the participants yet unknown to the other' ' 227 N.W.2d at 515, and suppressed the conversation between defendant and a police informant equipped with a concealed transmitter which was relaying to a police officer without defendant's knowledge and without authority of a search warrant.

As soon as electronic surveillance comes into play, there is an invasion of privacy. If there was probable cause to believe these communications would constitute crimes or contain evidence thereof, a warrant could have been secured. The failure to obtain a warrant does not prevent the informant from testifying to what he heard and observed in his conversations with defendant.

Focusing on the precise physical nature of the warrantless electronic intrusion, it is obvious that the underlying Fourth Amendment interests, in the extant situation, are obscrued if not obliterated.

The police conduct in this case must be deemed revolting and reminiscent of the "agent provateur" tactics employed by European secret police and the presence of Orwelian overtones cannot be denied.

POINT II

WAS THE PETITIONER, AFTER JURY TRIAL FOR INDICTMENT 2100-79, CONVICTED OF ONE COUNT OF USURY IN THE FIRST DEGREE, NEW YORK PENAL LAW SECTION 190.24, A CLASS C FELONY UPGRADING PENAL LAW SECTION 190.40, A CLASS E FELONY, VIA "A SCHEME" OR BUSINESS OF MAKING OR COLLECTING USURIOUS LOANS, FOR APPARENT INTERRELATED TRANSACTIONS OCCURRING DURING THE PERIOD 1977 TO 1979 AND ACQUITTED AT TRIAL OF GRAND LARCENY BY EXTORTION, SUBJECTED TO MULTIPLE JEOPARDY (DOUBLE JEOPARDY) WHEN FORCED TO PLEAD GUILTY TO THE CHARGES IN THE NINE OTHER INDICTMENTS BASED ON FACTS RELATED AND TESTIFIED TO AT THE FIRST TRIAL, APPARENTLY IN VOLVING INTERRELATED TRANSACTIONS AND CONTAINING IDENTICAL CHARGES.

Prior to trial petitioner moved pursuant to Sections 220.20 CPL and pursuant to Section 40.30(3) for a consolidation of all the indictments and the counts in each and every indictment so that the appellant would have had to face one trial which was denied.

P.L. Section 190.42 defines usury in the first degree as the charging, taking or receiving money or other property at a rate exceeding 25% and either the actor has previously been convicted of the crime of criminal usury or of the attempt to commit such crime, or the actor's conduct was part of a scheme or business of making or collecting usurious loans.

Practice Commentaries in McKinney's Consolidated Laws of New York states that:

> "The element raising the degree of the crime is that the defendant's * * * conduct was part of a scheme or business of making or collecting usurious loans. The new first degree is made subject to the mandatory sentencing provisions of Section 60.05."

> "The amendment appears to be aimed at the professional loanshark and particularly at providing a vehicle for applying to him the mandatory imprisonment provisions * * * ''.

Petitioner was sentenced to 5 to 15 years on each and every count of the indictment, except the extortion count for which he was acquitted, to run concurrently.

It is evident, based on the indictment, that the petitioner was charged with usury in the first degree based on the alleged scheme or business. Moreover that the legislature intended for the higher degree of the crime (Class C Felony from Class E Felony) to be committed in the extant situation for the alleged business and did not intend multiple convictions and punishments for each and every transaction in the business involving usury.

The extortion counts all testified to at the original trial was the same offense and linked to and part of the usury charge. In *People v. Ardito,* 106 Misc.2d at 102, it was stated:

> " . . . True, the original crime under investigation was usury, but extortion is usury's necessary adjunct and this Court cannot blind itself to such reality."

It should be noted that petitioner was acquitted of the

extortion charge in spite of the testimony of Bracken, Sanchez, and Starace as to the alleged acts and subsequent to the petitioner's plea of guilty to all charges which were not included in the original trial, the conspiracy charges were admitted to be multiple jeopardy and dismissed on motion September 17, 1980 with regard to Ardito and Marrazzo, the District Attorney stating:

> " * * * After conference with Mr. Merola and Mr. Maris, in the Appeals Bureau, our opinion is there is a question of double jeopardy which has merit and we upon the dual motion have no objection."

This colloquy took place with regard to the conspiracy indictment.

This is the converse situation of *Jeffers v. U.S.*, 432 U.S. 137 (1977) and would apparently fall directly into the rationale of *Sanabria v. U.S.*, 437 U.S. 69, wherein apparently therein the unit of prosecution was the gambling business. See also *Brown v. Ohio*, 432 U.S. 161 (1977); *U.S. v. Mallah* (2nd Cir. 1974), 503 F.2d 971, *cert. den.* 420 U.S. 995 (1975).

The precise manner in which an indictment is drawn cannot be ignored in determining double jeopardy consequences and in each and every count petitioner was accused "said conduct of defendant being part of a conspiracy and corrupt agreement and a scheme or business of making or collecting usurious loans." *Sanabria v. U.S., supra.* The allowable unit of prosecution under P.L. 190.42 is a business not its independent acts in furtherance of the business.

Interpreting legislative history sometimes is a perplexing and uncertain task. In this instance the legislative history is clear and the indictments based on the "scheme

or business" conforms with the legislative intent, *i.e.*, a Class C Felony directed to the professional loanshark for being in business. Focusing on the form and substance of the proceeding this is the only interpretation possible.

The guarantee against double jeopardy has been said to consist of three separate Constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against the second prosecution for the same offense after conviction. And it protects against multiple punishment for the same offense. *U.S. v. DiFrancesco,* 101 S.Ct. 426 (1980). Each and every Constitutional protection, *i.e.*, all three, were violated here.

The double jeopardy clause of the Fifth Amendment applied to the States through the Fourteenth Amendment, requires that, except in extremely limited circumstances, not present here, "all of the charges against the defendant that grow out of a single criminal act, occurrence, episode, or transaction" be prosecuted in a single proceeding. *Ashe v. Swenson,* 397 U.S. 436, 453-54 and n. 7 (1977) (Brennan, J., concurring).

Mootness

An Article 78 proceeding to bar subsequent prosecution was commenced in New York State Supreme Court, Appellate Division, after the initial conviction, which was denied and dismissed as moot by the New York State Court of Appeals.

The basic issues with regard to double jeopardy may be considered moot because petitioner received concurring sentences. In *Sibron v. New York,* 392 U.S. 40, 57, it was stated that "a criminal case is moot only if it is shown that

there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction."

As was stated in *U.S. v. Goodwin,* 50 L.W. at 4699 n. 10:

> "Moreover in those cases in which a defendant accepted the prosecution's offer, his reputation would be spared the unnecessary damage that would result from the placement of the additional charge on the public record."

Imagine the collateral derogatory legal consequences of having nine apparent illegal convictions on one's record.

POINT III

DID THE PROSECUTOR'S UNCONTROLLED MISCONDUCT AND VINDICTIVENESS DURING TRIAL VIOLATE PETITIONER'S RIGHT OF DUE PROCESS OF LAW.

The trial minutes disclose that there were repeated objections to certain phases of the direct examination conducted by the prosecution. When the Court sustained these objections the prosecutor in effect in its most pronounced form, disregarded the Court's rulings and continued asking either the same, similar or substantially similar questions and engaged in a continuous course of conduct in regard thereto. During testimony of Sanchez, the Court was requested by defense counsel to direct Sanchez to bring in copies of his income tax returns based on his testimony regarding interest deductions allegedly claimed thereon. The prosecutor immediately, full well knowing its impropriety, requested reciprocal direction.

The Court redacted checks given to petitioner by the witnesses which had been endorsed "GEN)." At the outset and during colloquy regarding the redaction, the Court barred the use of petitioner's nickname "The General." At summation, in direct abuse and violation of these instructions, the prosecutor referred to petitioner as "The General." Immediate motion for mistrial was again instituted, denied and instructions by the Court to the jury to remove from your mind the statement just made by the prosecutor. This comment by the prosecutor must have created an impression on the minds of the jurors, that they were unable to disregard it in their consideration, although admonished to do so. *Maestas v. U.S.*, 341 F.2d 493, 496 (10th Cir. 1965).

Prosecutorial comment on the defendant's failure to testify infringes on a fundamental right. Prosecutor's use of the word "General" was inflammatory and virtually challenged the jury, whether he should be permitted to be free and a deliberate violation of the Court's preclusion order.

It is evident that the prosecutor sought and did inject unfair prejudice into the trial to insure a conviction but hopefully not so much prejudice as to cause a reversal of conviction.

CONCLUSION

IT IS RESPECTFULLY SUBMITTED THAT THIS PETITION FOR CERTIORARI BE GRANTED.

Respectfully submitted,

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